Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, in light of this Court's decisions in, *inter alia*, *United States v. Nixon*, 418 U.S. 683 (1974), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the court of appeals' refusal to apply respondent's regulations against respondent constitutes reversible error?

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Petitioner, Deborah Katz Pueschel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in this proceeding on June 5, 2003.

OPINIONS BELOW

The opinion of the Merit Systems Protection Board (Appendix 2-30) is unreported. The judgment of the court of appeals (Appendix 1), summarily affirming the Merit Systems Protection Board, also is unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 5, 2003. On August 27, 2003, the Chief Justice granted Petitioner's motion to extend until October 3, 2003 the time

in which to seek the writ. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 40122(g), title 49 U.S. Code, provides

(g) Personnel management system.

(1) In general. In consultation with the employees of the Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement, not later than January 1, 1996, a personnel management system for the Administration that addresses the unique demands on the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

(2) Applicability of title 5. The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of—

(A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5 [5 USCS §§ 1201 *et seq.*];

(B) sections 3308-3320, relating to veterans' preference;

(C) chapter 71, relating to labor-management relations [*5 USCS* §§ 7101 *et seq.*];

(D) section 7204, relating to anti-discrimination;

(E) chapter 73, relating to suitability, security, and conduct [5 USCS §§ 7301 *et seq.*];

(F) chapter 81, relating to compensation for work injury [5 USCS §§ 8101 *et seq.*];

(G) chapters 83-85, 87, and 89 [5 USCS §§ 8301 *et seq.* through 8501 et seq., 8701 *et seq.*, and 8901 *et seq.*], relating to retirement, unemployment compensation, and insurance coverage; and

(H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

(3) Appeals to Merit Systems Protection Board. Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.

(4) Effective date. This subsection shall take effect on April 1, 1996.

Section 353.106(b), title 5, Code of Federal Regulations, (1998 comp.) provides:

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

Regulations of the Office of Worker Compensation Programs, U.S. Department of Labor, provide, at 20 C.F.R. § 10.505 (1998 comp.):

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work under § 10.210 and as defined in this subpart. The term "return to work" as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered

after one year. The Office of Personnel Management (not OWCP) administers this provision.

(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.

(b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury.

Regulations of the Federal Aviation Administration are included at Appendix 31-36.

STATEMENT OF THE CASE

Petitioner was an Air Traffic Controller at the FAA's Air Traffic Control Center in Leesburg, Virginia, since the 1970's. In 1979, petitioner initiated a claim of sexual harassment, in which she asserted that—as one of the first female Air Traffic Controllers at Leesburg—she was subjected to vicious name-calling and sexual innuendo. In 1983, the United States Court of Appeals for the Fourth Circuit sustained her claim and granted her relief. *Katz v. Dole*, 751 F.2d 209 (4th Cir. 1983).

In the meanwhile, petitioner was removed during the NATCA strike in 1981. Petitioner appealed to the Merit Systems Protection Board ("MSPB" or "the Board"), arguing that her absence from her facility was based not upon the strike, but upon her medical condition. In 1983, the Board reversed petitioner's removal and ordered her reinstated. *Katz v. Dep't of Transportation*, 17 M.S.P.R. 303 (1983). The Board based its decision, in part, on the Fourth Circuit's finding that petitioner's work environment at Leesburg was

permeated by sexual harassment. Petitioner, however, ultimately was required to return to Leesburg as a condition of her reinstatement.

After her return to Leesburg, petitioner filed a number of claims with the Office of Worker Compensation Programs ("OWCP"). Several of those claims were approved, and petitioner has received compensation for several medical conditions associated with her work as an Air Traffic Controller. On April 5, 1994, petitioner was advised by her superiors that her work schedule, which had been modified as requested by her doctors, was being changed. Petitioner left work. *See* Appendix 3. When petitioner's leave was exhausted, she was placed on LWOP. *Id.*

Petitioner filed a claim for benefits with OWCP with respect to the April 5, 1994 incident, but that claim was initially denied. Petitioner also filed a discrimination claim with respect to the incident, but that claim was also denied, a decision which was sustained on appeal. *Katz v. Slater*, 173 F.3d 425 (4th Cir.), *cert. denied*, 528 U.S. 814 (1999).

The FAA carried petitioner on approved leave without pay until October 1997. On April 9, 1998, the Center notified petitioner that her leave would continue only until May 11, 1998, at which time she was either to return to duty or be placed on "absent without leave" status, i.e., AWOL. The letter also advised petitioner that when she returned to duty on May 11, 1998, she would "be directed to report for a physical at the medical clinic at Washington Center". According to the letter, "failure to report for work *or to bring the required medical documentation on that date* may result in disciplinary action up to and including removal."

On July 1, 1998, the FAA promulgated its policy regarding employees who were absent from work for extended periods due to an illness or injury. That policy includes the following paragraph:

> United States Code, title 5, as well as Part 353 of title 5, Code of Federal Regulations, require that *all federal employers immediately and unconditionally accord an employee, whose work-related injury/disability has been overcome within one year after the date of commencement of workers' compensation benefits,* ***the right to resume his or her former or an equivalent position. . . . The FAA has chosen to carry workers' compensation recipients for one year to alleviate administrative issues with reinstatement,*** however, we will not ordinarily carry employees in LWOP more than one year.

(emphasis added). That policy was distributed to FAA managers, and not to employees. Petitioner was unaware of the policy until January 2001, almost two years after her removal.

By letter dated September 9, 1998, the Center proposed to remove petitioner from her position, on three grounds, only one of which is relevant: the proposal asserted that petitioner had not been at work since April 1994, and in April 1998 her doctor could not state when she would be able to return.

Petitioner, through counsel, replied to the proposal. With respect to the charge of inability to work, petitioner cited regulations of the U.S. Office of Personnel Management, which provide that "an employee absent because of compensable injury may be . . . separated unless the employee elects to use sick or annual leave". 5 C.F.R. § 353.106(b) (1998 comp.). In July 1998, the FAA notified OWCP that it would "honor [petitioner's] request for leave buy back". The amount of leave at issue was approximately 2,900 hours, or over one year. Had the FAA actually honored petitioner's

request to repurchase her leave (to this day, the FAA has not taken any steps to implement the July 1998 commitment), she could not have been separated.

On September 23, 1998, OWCP approved petitioner's claim for benefits as the result of the April 5, 1994 incident, on the ground petitioner's disability on and after April 5, 1994 was related to her earlier approved claim. Accordingly, OWCP awarded petitioner compensation, retroactive to April 5, 1994.

On December 13, 1998, the Center notified petitioner that she would be removed effective January 15, 1999, based solely on the charge of "inability to work".

Petitioner appealed her removal to the MSPB, which sustained the removal. The MSPB did not address Petitioner's claim that Respondent violated its own regulations in removing Petitioner as it did. Petitioner sought review in the U.S. Court of Appeals for the Federal Circuit. Following oral argument, the court of appeals summarily affirmed Petitioner's removal on June 5, 2003. Appendix 1.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' SUMMARY AFFIRMANCE OF THE DECISION OF THE MERIT SYSTEMS PROTECTION BOARD SUSTAINING PETITIONER'S REMOVAL IS INCONSISTENT WITH THIS COURT'S ESTABLISHED PRECEDENT REQUIRING COMPLIANCE WITH ADMINISTRATIVE REGULATIONS

In 1996, Congress authorized the FAA to adopt a Personnel Management System which was, for the most part, exempt from title 5 of the U.S. Code. 49 U.S.C. § 40122(g)(2). As a result, with several enumerated exceptions including worker compensation benefits administered by the OWCP, title 5 of the Code and title 5 of the Code of Federal Regulations are inapplicable to petitioner's removal.

Rather, and critically, the only requirements limiting Respondent's discretion to remove petitioner are those imposed by Respondent upon itself. It is thus astonishing both that the FAA failed utterly to comply with any of these requirements—indeed, professing either to be unaware of them or that they need not be followed—and that the Board and court of appeals simply relieved the FAA of these requirements.

Respondent's violations of its own regulations are virtually uncontested:

- the FAA's Health Program requires "periodic examination" of Controllers. Appendix 31. No examination of petitioner by the FAA was conducted after April 1994;
- the Health Program provides that in the event the medical condition of a Controller cannot be remedied within 30 days, her status "must be determined in accordance with paragraph 60", Appendix 31, ¶ 51b. While the FAA now asserts, and the Board apparently found, that petitioner's condition could not be remedied within 30 days, the FAA never applied the Health Program or reached such a conclusion;
- paragraph 60 of the Health Program provides that the employment status of incapacitated Controllers who request placement consideration "will be reviewed . . . to determine" retention, Appendix 35. There is no evidence such review was ever initiated;
- if pursuant to paragraph 60 the medical condition was determined to be temporary, the Controller "*shall*" be assigned administrative duties or placed on leave, and "*shall* be periodically evaluated". *Id.* ¶ 60a (emphasis added). Petitioner was never assigned or offered administrative duties and was never periodically evaluated;
- if pursuant to paragraph 60 the medical condition was determined to be permanent, the Controller "may" be reassigned or, if not reassigned, "*shall* be referred . . . for

placement in other available positions". Appendix 36. ¶ 60b (emphasis added). Between 1994 and April 1998, there is no evidence the FAA ever complied with paragraph 60b;

- the FAA argued that it accepted the assertion of Petitioner's doctor in 1998 that Petitioner was unable to resume her duties "at present". However, Respondent's own Health Program expressly provides that *the FAA* is to make such a determination based upon "medical tests and laboratory determinations, and medical specialty evaluations by selected physicians or other medical specialists". Appendix 31, ¶ 51c (emphasis added). Moreover, the Health Program specifies that "the Flight Surgeon normally will not" make such a determination "solely on the basis of information provided by the [Controller's] own physicians". *Id.* Respondent's chief physician testified that he did not comply with that requirement;

- on September 23, 1998, OWCP granted petitioner's claim and placed her in a compensation status. The FAA had just notified its Managers of its decision to "carry workers' compensation recipients for one year", but it removed petitioner after only four months;

- the only instance of a similarly situated employee presented to the MSPB was that of Edward Day. Day testified that he became medically incapacitated from working as an air traffic controller in 1992 and he applied for OWCP benefits in 1993. Appendix 37. Day left work in March 1993, Appendix 38, and he retired in August 1996, Appendix 41. Unlike Petitioner, Day was never fired by the FAA for being unable to work. Appendix 38.

- applicable OWCP regulations require agencies to approach employees receiving compensation with alternative positions or the opportunity for restricted or limited duties. 20 C.F.R. § 10.505 (1998).

It is well-established for the past half century that federal agencies are bound to follow their own regulations, even where those regulations limit the agencies' discretion more than might otherwise e the case. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (regulations of the Attorney General delegating certain of his discretionary powers to the Board of Immigration Appeals limited his authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (enforcing regulations requiring Secretary of State to remove employee on the merits only after considering entire record, even though underlying statute did not contain same requirement), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (State Department order setting forth procedures that must be followed before dismissing employee on security grounds were binding on the Department, and the failure to follow those regulations required reversal of such a dismissal); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (regulations dealing with Special Prosecutor carried force of law until amended or withdrawn).

With the withdrawal of FAA employees from title 5 of the U.S. Code, the only regulations governing the employment of those employees are those promulgated by the FAA itself. It is inconceivable that, having issued regulations governing in such specific detail the retention of employees with medical conditions, the FAA would be permitted simply to disregard those regulations wholesale, and in their entirety.

For the foregoing reasons, the judgment of the court of appeals, affirming Petitioner's removal from her employment with Respondent, should be reversed.

CONCLUSION

Petitioner requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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